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IN THE

Supreme Court of the United States

No. 520

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

TYLER GAS SERVICE COMPANY, THE CITY OF TYLER, TEXAS, and FEDERAL POWER COMMISSION,
Respondents.

REPLY BRIEF FOR PETITIONER

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The opposition of Tyler Gas Service Company (Tyler Gas) and City of Tyler (Tyler) to granting the Petition is grounded on wholly untenable reasons.

1. Suggestion that the District Court and Fifth Circuit dismissed for want of jurisdiction and did not adjudge merits contrary to the plain statements of such courts.

After stating the facts (R. 122-127) the District Court stated the issue and his ultimate conclusion as follows:

> "Having jurisdiction as well of the parties and subject matter, I pass to the main question, *whether the plaintiffs have made a case* calling for the exercise of the equitable powers of the Court. • • • ; but from the principles which are clearly established by the authorities, I am convinced *that the relief prayed for may not be granted.*" (R. 127-8.) (Emphasis supplied.)

The Court then summed up its holdings (Petition 13-19) which demonstrated the basis for the ultimate conclusion that the relief sought must be denied.

Contrary to the subsequent holding of *Mobile* (350 U.S. 332), lack of force in the claim of contract rights was thus declared:

> "During that period when the contract rates were in fact the lawful ones, *they became lawful not simply because the parties had agreed thereto.* Such rates received their vitality and breath of life from the fact the Commission *permitted* such contract to be filed and *ordered* such rates into effect *until further notice.*" R. 131.) (Emphasis supplied.) (Cf. Petition 16, 3-4.)

The District Court restated at the foot of its opinion:

> "Having jurisdiction, I conclude that the plaintiffs *do not show grounds for equitable relief*, and the action will be dismissed for that reason." (R. 132.) (Emphasis supplied.)

Dismissal was not, as Respondents suggest, for want of jurisdiction or for failure to exhaust administrative remedies, but upon the express ground that Respondents (plaintiffs) demonstrated at law no right to the relief prayed for.

Before Mobile, Tyler Gas and Tyler (R. 351-2)* were in full agreement with the Fifth Circuit (R. 361) that the decision was *on the merits* and in denial of their right to recover. *After Mobile,* they embraced that decision as an escape-lung to rescue them from the sunken wreck of merits denied. Even if wrong, finality of that judgment forever

* The position of Tyler Gas and Tyler on Motion to Dismiss their appeal in the Fifth Circuit for mootness was bottomed on claimed error of the District Court in refusing their right to recover *on the merits.* Their contentions made no suggestion of dismissal for want of jurisdiction, or that the judgment was sterile, and so harmless to the merits of their claims because merely holding they had not exhausted admininstrative remedies so that there was no judicial jurisdiction (R. 351-7).

prevents Tyler Gas and Tyler from asserting to the contrary (See Petition 11, FN 9).

Angel v. *Bullington* (1947) 330 U.S. 183, is "apt", but not for Respondents (Op. Br. 19-20). *Angel* declares the issues open for decision control res judicata arising therefrom (p. 187). It illustrates (p. 189), here paraphrased:

> "Bullington [Respondents] sought a deficiency judgment [enforcement by mandatory injunction of contract rights to prevent change in contract provisions and rates by any action or regulation initiated or permitted under the Natural Gas Act]. Angel [United] by demurrer [motion to dismiss for failure to state a claim and answer on the merits] resisted on the ground that a * * * statute precluded a deficiency judgment" [that non-existence of the asserted contract was res judicata, thus no contract to enforce by mandatory injunction; and that in any event, in the face of the Act, the design of its operation and regulation, the rights and duties of United, the "contract" was rendered inoperative and unenforceable and Respondents' claim was in defiance of Section 4 of the Act.]

The Court held Respondents not entitled to recover — an effective judgment for United.

It was open to Respondents, as to Bullington, to seek review in this Court, for the Fifth Circuit, like the North Carolina Supreme Court, was an intermediate tribunal. Accepting the judgment of an intermediate tribunal by choosing not to assert rights of review, concluded Respondents' rights, as Bullington's, "as effectively as though he [they] had proceeded through the highest tribunal available to him [them]". That the adjudication of the District Court and the Fifth Circuit "may have been erroneous is immaterial for purposes of res judicata. * * * A higher court would be available for an authoritative adjudication * * *" (p. 187).

Brownell v. *Chase National Bank* (1956) 352 U.S. 36, approved *Angel* and brought it up to date. We repeat (Petition 20): *Mobile* removed the Fifth Circuit decision from the authority of stare decisis but not from the compulsion of res judicata.

2. Courts adjudged merits, not exhaustion of administrative remedies.

Respondents suggest that that failure to exhaust administrative remedies only was adjudged by the Fifth Circuit (Op. Br. 13, 16-18).

This assertion by Respondents is in the teeth of the District Court and Fifth Circuit decisions. We have shown (Point 1, infra, Petition 12-18) that such decisions were on the merits.

Having held (1) that the "contract" gave rise to no such rights as Respondents claimed, and (2) that the "contract" was superseded and no longer in effect: the District Court then noted and accepted this admission and assurance of Respondents:

> "While plaintiffs concede that the Commission on final hearing may fix the rates at a figure which it determines to be reasonable, which may be at variance with and in complete disregard of the contract rates, plaintiffs urge that during the interval, while Commission has the matter under consideration, United be restrained from filing the said motion. It is urged that this will simply retain the status quo until the Commission has time to act." (R. 127.)

The Third Circuit emphasized the effect of this admission (215 F. 2d 885, Fn. 3).

Thus, the residual matter was the justness and reasonableness of the filed increased rates — a legislative area statutorily given to exclusive Commission decision. This impelled the District Court and the Fifth Circuit to the

statements quoted at pages 16 and 17 (Op. Br.). Such, too, is the procedural distinction noted by this Court (350 U.S. 346). The Fifth Circuit, having agreed with the District Court that the contract was inert, concluded, upon the assumptions expressed (217 F. 2d 78), no conflict existed with the Third Circuit on the procedural question. But on the primary substantive questions (Petition, 13-17), the Fifth Circuit was at categorical pains to frame the fundamental conflict it drew with the Third Circuit decision in *Mobile* (215 F. 2d 883), respecting the effect, rights, and duties of Section 4 of the Act upon private contract rates.

CONCLUSION

For reasons set forth in the Petition, it is urged that a Writ of Certiorari to review the judgment of the Court below should be granted.

Respectfully submitted,

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